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No. 87-1464

IN THE

Supreme Court of the United States

October Term, 1987

SPIRO T. AGNEW and WILLIAM H. WOOLVERTON, JR.,
Petitioners,

against

ALICANTO, S.A. and WILLIAM H. SHAW,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari

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STATUTE INVOLVED

New York Civil Practice Law and Rules §6212. Motion papers; undertaking; filing; demand; damages.

"(a) Affidavit; other papers. On a motion for an order of attachment or for an order to confirm an order of attachment, the plaintiff shall show, by affidavit and such other written evidence as may be submitted, that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff."

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counter-Statement of the Case

A. The attachment motion was denied in the district court because plaintiffs failed to show a probability of success on the merits.

New York's attachment statute, CPLR 6212(a), authorizes an order of attachment where the defendant is a

foreign resident but only if the plaintiff can demonstrate a probability of success on the merits.

Because, as foreign residents, respondents (hereinafter "defendants") could only successfully oppose the attachment motion by showing the petitioners' (hereinafter "plaintiffs'") inability to demonstrate a probability of success on the merits, defendants agreed to extend the life of the temporary restraining order granted on December 30, 1986 so they could simultaneously prepare their opposition to plaintiffs' motion and prepare a motion for summary judgment. Pursuant to a "so ordered" stipulation executed by the attorneys for all parties, defendants served and filed their papers on April 24, 1987.

The Federal Rules do not provide plaintiff with the right to reply to defendants' papers filed in opposition to plaintiffs' motion for an order of attachment. F.R.Civ.P. 6(d) provides for a motion and opposing affidavits only.

Even though plaintiffs were not entitled under the Rule to a reply on the attachment motion, under the so ordered stipulation plaintiffs were given three weeks after the April 24, 1987 service of defendants' papers, that is, until May 15, 1987, to respond.

Instead of filing papers by May 15, 1987, however, on May 8, 1987 plaintiffs moved for additional time, to June 19, 1987, to respond to defendants' summary judgment motion. They also asked to have the temporary restraining order further extended until at least that time. Defendants opposed extension of the temporary restraining order since plaintiffs had failed to show good cause for such extension. F.R.C.P. 65(b) (requiring, inter alia, that "the Court shall proceed to hear and determine such motion [to dissolve a temporary restraining order] as expeditiously as the ends of justice require.") Defendants asked the court to decide the attachment motion upon the papers submitted to that date which it did

on May 14 after determining that the plaintiffs had failed to demonstrate a probability of success on the merits as required by CPLR 6212.*

After district court judge Jack B. Weinstein denied plaintiffs' motion for attachment, plaintiffs asked for a rehearing or, alternatively, for a stay pending appeal. By order entered May 22, 1987, the district court granted plaintiffs a rehearing.

In support of their motion for a rehearing on the attachment motion, plaintiffs submitted a brief and an additional 41 pages of affidavits and affirmations. After considering them, and after

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* At p. 7 of their petition, plaintiffs state that "on May 14, 1987 ... the defendants moved on one's day notice to ... to dissolve the restraint and deny the attachment." Plaintiffs fail to mention that the so-ordered stipulation signed on April 7 required any reply papers on the attachment motion to be served by May 15 and that by May 15 plaintiffs had repudiated that stipulation by failing to serve papers and by instead moving for an adjournment.

affording plaintiffs oral argument on their motion, on May 27, 1987 the district court again determined that plaintiffs had not shown a likelihood of success on the merits, denied their motion for an order of attachment, and vacated the ex parte temporary restraining order granted on December 30, 1986. In its order, the court granted the plaintiffs further leave to renew their motion "upon a showing of further merit." (A-6) The plaintiffs have not, to date, taken such opportunity.

In their papers addressing the merits of the plaintiffs' claims, the defendants demonstrated the following to the district court:

1. Agnew was not the procuring cause of the Air Force contract

Defendants demonstrated by citation to the complaint and to plaintiff Agnew's deposition that Agnew seeks a commission as the procuring cause of the contract between Aydin Corporation and the Argentine Air Force. They also set forth the case law authority demonstrating that

this requires Agnew to show there was a "direct and proximate link" between his efforts and the consumation of the contract. But defendants also showed that Agnew admitted at deposition:

(a) Agnew never heard of the Air Force contract prior to its execution.

(b) Agnew never learned, up to the time of his deposition, the purpose of the Air Force project, what equipment was involved in the Air Force project, where the equipment was located, who participated in negotiations on the project and when the contract was negotiated.

(c) Agnew had no evidence that any government officials he met in Argentina ever had anything to do with the Air Force contract.

(d) At no time during either of Agnew's trips to Argentina did he discuss the Air Force project with anyone nor did he ever hear of it.

In the Court of Appeals, Agnew admitted that he was not retained to

secure the Air Force contract and that he did not act as a broker with respect to the Air Force contract. Indeed, at the oral argument on the rehearing motion in the district court Agnew's attorney conceded as follows:

> "In their opposition [to] the motion the defendants have said ... Mr. Agnew knew nothing about the Air Force contract. He never said that he did. He never said that he went down there to get an Air Force contract; that he knew anything about the Air Force contract. He was retained, as he said in his deposition, he was told by Nelson of [Aydin], it was important for him to talk to the junta to get the contract. He doesn't know what contract that was; Army, Navy, Air Force. He has never claimed that he knew what contract that was.
>
> "He knew of a telecommunications contract for the Argentine military, that's all he knew."
>
> * * *
>
> "He has not said he was the procuring cause of this contract, he only said that he was engaged by Nelson of [Aydin] to go and present [Aydin] Corporation to the junta to show that

> [Aydin] Corporation could bid on telecommunication projects."

Since Agnew conceded he was not "the procuring cause of this contract," and since his admissions at deposition conclusively proved he was not, he failed to show a likelihood of success on his complaint seeking a commission on the Air Force contract.

2. Woolverton's claim is barred by his August 9, 1984 termination agreement with Alicanto.

Woolverton's claim that he is entitled to a share of the Alicanto commission from the Air Force contract is disproven by his testimony at deposition and by the documents identified by him at deposition. In particular, an August 9, 1984 agreement which terminated Woolverton's association with Alicanto, which he negotiated with the assistance of counsel, by its terms was entered into

> "[i]n view of the termination of the association between [Woolverton] and [Alicanto], and the further desires of both Woolverton and Alicanto to agree as to Woolverton's participa-

> tion in the following pending and future possible projects...."

The agreement further provided:

> "This agreement sets forth all projects pending between the parties as of the date of this agreement.
>
> "This agreement may not be changed other than by a further agreement in writing signed by both parties."

At deposition, Woolverton conceded that on August 9, 1984, when the above agreement was executed, Alicanto was still receiving commissions from Aydin on the Air Force contract. Clearly, then, the Air Force project was one of Alicanto's "pending projects". Nevertheless it was not included in the August 9 agreement as a project concerning which Woolverton was entitled to a commission. This showed that Woolverton's pleaded claims for a commission on the Air Force project were lacking in merit.

B. In the Court of Appeals, plaintiffs grounded their appeal on the claim that the district court judge abused his discrein refusing to grant them a lengthy adjournment of their attachment motion.

It is noteworthy that not until page 20 of their petition for writ of certiorari do plaintiffs mention the fact that the district court denied their motion for attachment on the ground that plaintiffs had not shown a probability of success on the merits as required to CPLR 6212(a). It is equally noteworthy that in setting forth the statutes involved at pp. 2-4 of their petition, plaintiffs do not even cite 6212(a), although it was the basis for the district court's disposition. The reason for these lacunae is clear: the plaintiffs did not and cannot challenge the district court's view of the merits of their case.

In their principal Court of Appeals brief, plaintiffs began their discussion of the facts by stating that "this case [is] in essence entirely

> concerned with procedure in the district court...."

This conclusion was based on the contention, set forth in the Argument section of plaintiffs' brief, that

> "[w]ithout affording the plaintiffs the opportunity to complete their discovery and submit its fruits or other matter in opposition to the defendants' motion for summary judgment, the court below has, without waiting to hear or consider any papers in opposition prepared by the plaintiffs in answer to the defendants' motion, in effect granted partial summary judgment against them with respect to whatever unspecified allegations and points of law the court may have relied upon in determining that they had failed to show a probability of success on the merits."

In their Synopsis of Argument, the plaintiffs

> "urge[d] that the order appealed from be reversed and set aside with direction to the district court to maintain the temporary restraining order in effect until the plaintiffs' attachment motion and the defendants' summary judgment motion are 'simultaneously considered' and disposed of in accordance with the defendants'

> application and the Court's order of March 4, 1987."

And in their Reply Brief in the Second Circuit, plaintiffs recapitulated their argument as follows:

> "In their opening brief, the plaintiffs have shown that the order of the district court vacating the temporary restraining order and denying attachment should be reversed and set aside because that order constituted a grant of partial summary judgment on one's day notice...."

Thus, in the Court of Appeals plaintiffs based their argument on the district court's alleged abuse of discretion in refusing to grant them an adjournment.

C. In the past nine months since the attachment motion was plaintiffs have not sought to establish a probability of success on the merits notwithstanding the district court specifically granted "leave to renew upon a showing of further merit" and notwithstanding plaintiffs have obtained to this date successive stays of the vacatur of the temporary restraining order. To the contrary, plaintiffs refused defendants' offer to renew the attachment motion at the time defendants' summary judgment motion was considered.

Although plaintiffs have argued in the Second Circuit and in this Court that the denial of their attachment motion on May 27 marked the death knell of their case, and have similarly argued that the refusal of the district court to grant a further adjournment of the attachment motion in effect constituted "partial summary judgment against plaintiffs", the fact is that in its May 27 order denying attachment the district court specifically granted the plaintiffs

> "leave to renew upon a showing of further merit." (A-6)

And yet, in the almost ten months since that order was entered, plaintiffs have made no effort to demonstrate in a renewal motion a probability of success on the merits notwithstanding they have obtained successive stays of the vacatur of the temporary restraining order. This is perhaps the best evidence of the weakness of plaintiffs' case and the lack of merit to their attachment motion.

Since the relief plaintiffs requested in the Court of Appeals was a directive to the district court that

> "the plaintiffs' motion for attachment and the defendants' motion for summary judgment [be] considered simultaneously and determined"

(plaintiffs' principal brief, p. 41), when the defendants' summary judgment motion came on to be heard by the district court before the argument of the appeal in the Second Circuit, the defendants requested that the district court reconsider the attachment motion in the light of plain-

tiffs' summary judgment papers. Mirabile dictu, the plaintiffs objected to reconsideration of their attachment motion notwithstanding this was precisely the relief they requested in the Court of Appeals.

The obvious strategy of the plaintiffs was to prolong as long as possible the opportunity to complain that they had never been adequately heard on the merits of their case. The strategy backfired, however, when the district court, in the course of its decision denying summary judgment, stated that the plaintiffs' case was "very thin," "highly dubious," and "awfully thin."

These repeated findings of the district court judge, after consideration of the plaintiffs' summary judgment papers, effectively answered plaintiffs' prayer for relief in the Court of Appeals that their summary judgment papers be considered in determining whether plaintiffs showed a probability of success on

the merits so as to sustain an order of attachment.

Summary of Argument

In their complaint, both plaintiffs seek to share commissions earned by defendant Alicanto, S.A. in connection with a $57 million telecommunications contract between the Argentine Air Force and Aydin Corporation; plaintiff Agnew alleges he was the procuring cause of the contract and plaintiff Woolverton claims he had an employment agreement to share in the commissions.

In the extensive papers submitted by plaintiffs on December 30, 1986 in support of an order of attachment and for an ex parte provisional order of attachment or restraining order, plaintiff Agnew failed to disclose (but later conceded at deposition) that although he was seeking a commission as the procuring broker on the Aydin/Argentine Air Force contract, he in fact never heard of the Air Force contract prior to its execution,

never discussed the contract with anyone, and didn't even know whether any government official he met in Argentina had anything to do with the Air Force contract. Similarly, Woolverton failed to disclose in his affidavit that although he was claiming an oral employment agreement with Alicanto for a commission on the Air Force contract, he in fact signed a written termination agreement with Alicanto on August 9, 1984, in the presence of his attorney, setting forth "all projects pending between the parties" for which he would be entitled to a commission but failing to mention the Aydin Air Force contract.

On December 30, 1986, plaintiffs obtained an ex parte restraining order, in lieu of a provisional order of attachment, preventing defendants from using their New York property ($380,000 of which all but $40,000 belongs to the individual defendant William H. Shaw). On May 27, 1987, the plaintiffs' motion for an order of attachment was denied because

plaintiffs failed to show a probability of success on the merits, and the restraining order was vacated. Nevertheless, plaintiffs have obtained successive stays of the vacatur of the restraining order until the present day, 15 months after it was granted ex parte and notwithstanding plaintiffs were unable to show to the district court a probability of success on the merits.

In the Second Circuit, the plaintiffs did not seek to demonstrate a meritorious case; rather, they grounded their appeal on the claim that the district judge had abused his discretion in refusing to grant them a lengthy adjournment of their attachment motion so it could be heard simultaneously with defendants' motion for summary judgment. In Point I below we show this refusal to grant an adjournment was not appealable.

In response to plaintiffs' appeal, the defendants offered to have the attachment motion reconsidered by the district court at the time of the summary

judgment argument, but plaintiffs rejected the offer notwithstanding this was precisely the relief they were seeking in the Second Circuit. Thereafter, although the district court judge had granted plaintiffs leave on May 27, 1987 to renew their motion for an attachment "upon a showing of further merit," they failed to do so.

On these facts, the Second Circuit found the May 27 order not final "because it is subject to a renewal motion upon a showing of changed circumstances." In Point II below we show this ruling was correct on the particular facts of this case and fails to present a question of general interest which would warrant review by this Court.

New York's attachment statute was substantially amended in 1977 after a three judge district court found the predecessor statute unconstitutional. That court so ruled primarily because the statute was read as not requiring the plaintiff "to litigate the question of the likelihood that it would ultimately pre-

vail on the merits." See Carey v. Sugar, 425 U.S. 73,77.* Although the order of the three judge district court was subsequently vacated pending a construction of the statute by the New York State courts, Carey v. Sugar, supra, New York as well as other states (e.g., New Jersey, see Britton v. Howard Sav. Bank, 727 F.2d 315, 319 [3d Cir. 1984]) decided to amend their attachment provisions to avoid the constitutional problems noted in Carey v. Sugar. The New York amendments were intended, specifically, to place upon the

* Compare Fuentes v. Shevin, 407 U.S. 67, 87 (striking down replevin statutes for failing to mandate pre-seizure hearing on ground Due Process clause requires an opportunity to be heard before deprivation of any significant property interest. "The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property."), and North Georgia Finishing v. Di-Chem, 419 U.S. 601, 607 (striking down Georgia's garnishment statute because "there is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment").

plaintiff the burden of establishing the likelihood of success on the merits at the time of the attachment motion. See Weinstein, Korn & Miller, New York Civil Practice, ¶ 6223.05; McLaughlin, Practice Commentaries, McKinney's New York CPLR C6212.1.

The New York attachment statute as amended in 1977 contemplates a motion to confirm an attachment within 10 days of levy based upon a showing of a probability of success on the merits. Yet, in the present case plaintiffs have sterilized defendants' use of their property for 15 months without ever demonstrating a likelihood of success and solely because they obtained an ex parte order based upon affidavits which failed to disclose the obvious defects in their case. The restraining order which plaintiffs have been able to maintain to this day has caused defendants (particularly William H. Shaw) great hardship and constitutes just the kind of pretrial deprivation without hearing which the New York attachment

statute, and this Court's Due Process cases, were designed to prevent.

REASONS FOR DENYING THE WRIT

Point I

Plaintiffs' appeal to the Court of Appeals was based on Judge Weinstein's refusal to grant further adjournment of the attachment motion which determination was not appealable.

Plaintiffs based their appeal in the Second Circuit on the contention that Judge Weinstein should have further adjourned the attachment motion so as to hear it at the same time as the defendants' summary judgment motion. Plaintiffs requested in their prayer for relief that the two motions be "considered simultaneously."

But Judge Weinstein's refusal to grant further adjournments of the attachment motion and his refusal to further extend the temporary restraining order were within the proper exercise of

his discretion and nonappealable. Compare Hart v. Community Sch. Bd. of Brooklyn, N.Y. Sch. Dist. #21, 497 F.2d 1027 (2d Cir. 1974), with N.A.A.C.P. v. Thompson, 321 F.2d 199 (5 Cir. 1963). Particularly is this so since New York CPLR §6211 contemplates a motion to confirm an attachment within 10 days of levy, and F.R.C.P. 65(b) contemplates a hearing on a temporary restraining order within at most 20 days of issuance. Here, plaintiffs had almost five months during which they prepared their attachment motion papers, had another four months before defendants filed their papers in opposition, had three more weeks to file reply papers, were then given another twelve days to file papers on rehearing, and finally were given leave to renew their attachment motion upon a showing of further merit which right they failed to exercise in the next nine months.

Repeatedly, plaintiffs have argued they were given just "one-day's notice" that their attachment motion would

be heard on May 15 and they were not given sufficient time to reply to the defendants' papers. As noted above (ftn. p. 4), what plaintiffs fail to advise this Court is that a so-ordered stipulation signed on April 7 required any reply papers on the attachment motion to be served by May 15 and that on May 15 plaintiffs had repudiated the stipulation by failing to serve their papers and by instead moving for a lengthy adjournment. Nevertheless, the plaintiffs' moving attachment papers were considered on the motion which was all plaintiffs were entitled to have considered under the New York attachment statute and the federal rules. In any event, on the rehearing motion plaintiffs presented a brief and 41 pages of reply affidavits and affirmations in support of attachment which were considered by the district court.

In sum, then, plaintiffs based their appeal below not on the merits of their motion but upon the refusal of the district court judge to grant an adjourn-

ment. Since an order denying a motion for an adjournment in the circumstances set forth above is not appealable, a writ of certiorari should not be granted to consider the question presented in the plaintiffs' petition.

Point II

The Court of Appeals properly found that the May 27 order lacked finality since plaintiffs have had over nine months from the date their attachment motion was denied to renew their motion, and since plaintiffs were offered the opportunity to renew their attachment motion at the time the summary judgment motion was heard and refused said opportunity.

Plaintiffs were expressly given the opportunity in Judge Weinstein's May 27 order to renew their motion for an attachment "upon a showing of further merit" and have failed to date to do so notwithstanding the continuance of the stay of the vacatur of the temporary restraining order. Moreover, although the relief sought by plaintiffs in the Court of Appeals was an order requiring the

attachment and summary judgment motions to be heard simultaneously, when defendants offered plaintiffs the opportunity to renew their attachment motion so as to be heard simultaneously with the summary judgment motion plaintiffs rejected the offer.

Under these circumstances, plaintiffs simply cannot bring themselves within the authorities cited at pp. 8-15 of their petition which, they say, hold final an order which makes further litigation on the merits an "empty rite." The Court of Appeals was correct in finding that the May 27 order lacked finality "because it is subject to a renewal motion upon a showing of changed circumstances." (A-2)

CONCLUSION

The petition should be denied.

Dated: Mineola, New York
March 31, 1988

Respectfully submitted,

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